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5 UNITED STATES DISTRICT COURT  
6 EASTERN DISTRICT OF WASHINGTON

7 UNITED STATES OF AMERICA,

8 Plaintiff,

9 -vs-

10 JOSE LUIS MANZO,

11 Defendant.

NOS. CR-07-2042-WFN-2  
CR-07-2071-WFN-1  
CR-07-2088-WFN-1

ORDER

12  
13 Pending before the Court is Movant's 28 U.S.C. § 2255 Motion to Vacate, Set Aside,  
14 or Correct Sentence, presented by Mr. Manzo *pro se*. The Court has reviewed the file and  
15 the motion and is fully informed. For the reasons stated below, the Court Motion is denied  
16 in part. The Government is requested to file a response to the remaining issue.

17 **I. BACKGROUND**

18 On April 10, 2007, Mr. Manzo was indicted in CR-07-2042 for conspiracy to distribute  
19 500 grams or more of a mixture or substance containing a detectable amount of  
20 methamphetamine and distribution of 50 grams or more of actual methamphetamine. On  
21 June 6, 2007, Mr. Manzo was indicted in CR-07-2071 for conspiracy to possess with intent  
22 to manufacture a controlled substance. Mr. Manzo went to trial in CR-07-2071 and was  
23 found guilty on the sole count. Following his conviction in CR-07-2071, Mr. Manzo entered  
24 into a plea agreement with the Government and pled guilty to Count 10 of the Indictment in  
25 CR-07-2042 on May 5, 2007. In that plea agreement, Mr. Manzo waived his right to appeal  
26 his conviction in both matters, but reserved his right to appeal incorrect Guideline

1 calculations and any sentence based on such error in both cause numbers. Mr. Manzo also  
2 waived his right to file a 28 U.S.C. §2255 Motion except for "ineffective assistance of  
3 counsel based on facts discovered after the plea and sentencing." On September 4, 2008,  
4 the Court sentenced Mr. Manzo to 292 months imprisonment in CR-07-2042 concurrent to  
5 240 months imprisonment in CR-07-2071 and 3 years supervised release.

## 6 II. ANALYSIS

7 "To earn the right to a hearing. . . [Movant] [is] required to allege specific facts which,  
8 if true, would entitle him to relief." *Ortiz v. Stewart*, 149 F.3d 923, 934 (9th Cir 1998),  
9 quoting *United States v. McMullen*, 98 F.3d 1155, 1159 (9th Cir 1996). If an evidentiary  
10 hearing is not required, the Court "shall make such disposition of the motion as justice  
11 dictates." Rule 8, Rules Section 2255 Proceedings (West 2006). All issues but the plea  
12 agreement issues fail as a matter of law.

13 To gain relief, Movant must establish that (1) he is in custody under a sentence of this  
14 federal court; (2) his request for relief was timely; and (3) the court lacked either personal  
15 or subject matter jurisdiction, the conviction or sentence is unconstitutional, the conviction  
16 or sentence violates federal law, or the sentence or judgment is otherwise open to collateral  
17 attack. 28 U.S.C. § 2255. Mr. Manzo established that he satisfies the first two prongs.

18 Mr. Manzo argues that his sentence violates federal law and was unconstitutional, thus  
19 satisfying the third prong, based on three separate grounds. First he alleges ineffective  
20 assistance of counsel during plea negotiations, specifically for advising Mr. Manzo to waive  
21 his appeal in CF-07-2017. Second, Mr. Manzo argues that the Court abused its discretion  
22 in sentencing. Lastly, Mr. Manzo argues that the Government violated his due process rights  
23 by breaching the plea agreement.

24 In order to prevail on his ineffective assistance claim, Mr. Manzo must prove that  
25 counsel's performance was deficient and that he was prejudiced by this deficient  
26 performance. *U.S. v. Strickland*, 466 U.S. 668, 687 (1984). Courts must "indulge a strong

1 presumption that counsel's conduct falls within the wide range of reasonable professional  
2 assistance; that is, the defendant must overcome the presumption that, under the  
3 circumstances, the challenged action might be considered sound trial strategy." *Strickland*,  
4 466 U.S. at 689. "A fair assessment of attorney performance requires that every effort be  
5 made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of  
6 counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the  
7 time." *Id.* at 689 (internal citations omitted). In order to show prejudice, Mr. Manzo must  
8 show that but for counsel's errors the results of the proceeding would have been different.  
9 *Id.* at 694.

10 Mr. Manzo cannot satisfy the prejudice prong of the *Strickland* test. Mr. Manzo  
11 alleges several complaints regarding the results obtained by his trial counsel during  
12 sentencing, but alleges little in the way of error. He complains that the Court incorrectly  
13 calculated the Guideline sentence, but acknowledges that his counsel objected to each of the  
14 areas of concern that he raises in his Motion at the time of sentencing.

15 He also alleges that his counsel was ineffective for advising him to waive his  
16 appeal in CR-07-2071. He correctly points out that had there been an issue that was a  
17 "dead bang winner" advice to Mr. Manzo to waive appeal may have caused prejudice.  
18 However, Mr. Manzo points to no issues which would have been resolved in his favor  
19 upon appeal. On the contrary, Mr. Manzo lists several issues which the Ninth Circuit already  
20 ruled against him on issues that he had preserved his appeal rights in his plea agreement.  
21 Though he did waive his appeal, he raises no new issues that he wished he could have  
22 appealed. Thus, Mr. Manzo suffered no prejudice from waiving his right to appeal the  
23 conviction.

24 Mr. Manzo's claims that the Court abused discretion fails. Issues "considered on direct  
25 appeal are not subject to collateral attack under 28 U.S.C. § 2255." *Egger v. United States*,  
26 509 F.2d 745, 748 (9th Cir. 1975). Mr. Manzo rehashes issues that the Ninth Circuit already

1 addressed on direct appeal and affirmed the Court's sentence. Mr. Manzo raises no new  
2 issues. The Court will not second guess the rulings of the Ninth Circuit.

3 Mr. Manzo claims that the Government offended due process by breaching the plea  
4 agreement, specifically, the Government failed to recommend a downward departure for  
5 acceptance of responsibility and did not live up to its end of the plea deal. Further, Mr.  
6 Manzo argues that the plea agreement was illusory. In the plea agreement, the Government  
7 agreed to recommend a three level departure for acceptance of responsibility, but failed to  
8 do so at the time of sentencing. In fact, in the Government's sentencing memorandum, the  
9 Government argues against the acceptance of responsibility departure. The Court notes that  
10 the plea agreement clearly states that the Court is not a party and is not required to follow the  
11 recommendations of the parties. The Ninth Circuit affirmed the Court's finding that  
12 acceptance of responsibility did not apply. The Court also recognizes that the Government  
13 made no promises regarding its recommended sentence except that the sentences in all of Mr.  
14 Manzo's pending cases run concurrently. However, in the plea agreement the parties agreed  
15 that the final adjusted offense level was 31, including the three level departure for acceptance  
16 of responsibility which would have exposed Mr. Manzo to a guideline range of 135 - 168  
17 months for CR-07-2042. The statutory maximum in CR-07-2071 is 240 months. Based on  
18 the plea agreement, it is likely that Mr. Manzo expected a sentence no longer than 240  
19 months.

20 The plea agreement issues merit a response from the Government. Due to the  
21 mishmash of issues in Mr. Manzo's Motion, the Court requests that the Government  
22 address the due process argument, ineffective assistance of counsel claims arising from the  
23 alleged breach of the plea agreement and from the alleged illusory nature of the plea  
24 agreement, and any other legal issues surrounding the Government's alleged breach of  
25 contract to ensure all issues raised by Mr. Manzo related to the breach of the plea agreement  
26 can be addressed.

1 Mr. Manzo's claims of ineffective assistance in sentencing and sentencing errors by  
2 this Court cannot meet the standard under a §2255 Motion even assuming all facts alleged  
3 by Movant to be true. Thus, Movant's Motion on those issues must be denied. However, Mr.  
4 Manzo's claims surrounding the Government's alleged breach of the plea agreement merits  
5 a response from the Government. Accordingly,

6 **IT IS ORDERED** that:

7 1. Movant's Motion to Vacate Judgment and Sentence Pursuant to 28 U.S.C. § 2255,  
8 filed October 14, 2009, **CR-07-2042 Ct. Rec. 721 and CR-07-2071 Ct. Rec. 517**, is  
9 **DENIED IN PART and RESERVED IN PART.**

10 2. Notice shall be served upon the United States to answer Movant's § 2255 Motion,  
11 as outlined above by **August 31, 2010**. The contents of the answer shall conform to the  
12 requirements of Rule 5(b) of the Rules-Section 2255 Proceedings.

13 3. Movant shall serve and file a reply to United States answer, if any, **within thirty**  
14 **(30) days of service** of United States' answer.

15 4. If Movant raises new issues in his reply, the Government may respond to those  
16 issues in a supplemental response to be filed and served **within 20 days of service** of the  
17 Movant's reply.

18 4. The Court will take the matter under advisement when the briefing is complete.

19 5. Movant shall serve upon the United States Attorney a copy of every further  
20 pleading or document submitted for consideration by the Court. He shall include with the  
21 original paper to be filed with the District Court Executive, a certificate stating the date a true  
22 and correct copy of any document was mailed to the United States. Local Rule 5.1(a). Any  
23 paper received by a District Court Judge which has not been filed with the District Court  
24 Executive or which fails to include a certificate of service will be disregarded by the Court.  
25 Movant is also advised that throughout this action he must notify the District Court  
26 Executive regarding any change of address.

1 The District Court Executive is directed to file this Order and provide copies to  
2 counsel and Mr. Manzo;

3 **DATED** this 27th day of July, 2010.

4  
5 s/ Wm. Fremming Nielsen  
6 WM. FREMMING NIELSEN  
07-27 SENIOR UNITED STATES DISTRICT JUDGE